

MM Dkt. 92-51

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APR 22 1991

Federal Communications Commission
Office of the Secretary

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MMB File Nos. 910221A and
840921A
In re Petitions for Declaratory
Ruling Regarding Reversionary
and Security Interests

Dear Ms. Searcy:

Enclosed please find an original and four copies of
O'Melveny & Myers' comments on the matter of Petitions for
Declaratory Ruling Regarding Reversionary and Security
Interests.

Sincerely,



F. Amanda DeBusk
for O'MELVENY & MYERS

Enclosure

MM Dkt. 92-51

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 22 1991

Federal Communications Commission
Office of the Secretary

In re Petitions for
Declaratory Ruling Filed
Regarding Reversionary
and Security Interests

MMB File No. 910221A

COMMENTS OF O'MELVENY & MYERS

April 22, 1991

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Before the
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APR 22 1991

Federal Communications Commission
Office of the Secretary

In re Petitions for
Declaratory Ruling Filed
Regarding Reversionary
and Security Interests

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) MMB File No. 910221A
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COMMENTS OF O'MELVENY & MYERS

These comments are submitted by the law firm of O'Melveny & Myers in response to the Federal Communications Commission ("FCC" or "Commission") Public Notice of March 15, 1991, "Petitions for Declaratory Ruling filed Regarding Reversionary and Security Interests." O'Melveny & Myers represents both lenders and FCC licensees. The firm frequently advises its clients on the purchase and sale of communications companies, the financing of communications company acquisitions and operations, the financial arrangements for troubled communications companies, and bankruptcy matters. The firm is frequently asked to advise clients on the Commission's rules and policies concerning security interests in assets, stock and licenses.

In these Comments, O'Melveny & Myers expresses support for the proposal in this docket that the Commission issue a declaratory ruling that subject to certain

conditions, FCC licensees may give creditors a security interest in their licenses.

1. Permitting FCC Licensees To Give Creditors Security Interests In Their Licenses Would Be Good Public Policy.

The recent case In re Oklahoma City Broadcasting Co., d/b/a KGMC-TV, Debtor, 112 B.R. 425 (Bankr. W.D. Okl. 1990) ("Oklahoma City"), has had a chilling effect on the willingness of creditors to make loans to FCC licensees. In Oklahoma City, a bank loaned a television station between \$2.7 and \$3.3 million and obtained a security interest in all of the station's assets. Id. at 427-28. The station went into bankruptcy under Chapter 11. Id. at 427. To address the debtor's plan of reorganization, the court had to value the bank's collateral. The bank argued that its lien encumbered either the full approximately \$3 million going-concern value of the station or the \$3 million offered by a potential buyer. Id. at 430. However, the court held that the bank could only collect \$2 million. Id. at 430-31. It reasoned that the bank did not have a security interest in the license and that therefore neither the going-concern value nor the entire offered purchase price was encumbered by the bank. The court thus made the \$1 million differential available for distribution to unsecured creditors. Id.

As an unsecured creditor for \$1 million, the lender bank was in a much worse position than if it had been a secured creditor. As a fully secured creditor, the bank would have been repaid the \$1 million whereas as an unsecured creditor, it had to share the \$1 million with other unsecured creditors. In addition, as a fully secured creditor, it would have continued to receive interest on the loan (to the extent of its security interest) after the bankruptcy filing, whereas as an unsecured creditor, it was not entitled to receive post-petition interest. 11 U.S.C. § 506(b) (1988). Further, as a fully secured creditor, it could have retained any loan payments made within 90 days before the filing of the bankruptcy petition, whereas as an unsecured creditor, any payments were subject to recovery. 11 U.S.C. § 547(b)(5), (c)(2) (1988).

As a consequence of Oklahoma City, banks are skittish about making loans to communications companies that hold FCC licenses. Because it is extremely difficult to put a price tag on the value of an FCC license (and because it is also difficult to predict how other bankruptcy courts may handle this issue), banks are taking a very cautious approach in deciding how much money they can lend communications companies. They are finding it riskier to lend to communications companies than to other similarly situated companies. Thus, FCC licensees have access to less financing at less favorable rates than other companies.

Because of higher financing costs, the profitability of stations will be diminished. Many stations are already facing financial difficulties, and some of them may be forced into bankruptcy. For other stations, less funding will be available for new, creative programming. Efforts to upgrade technology, to invest in research and development, and to undertake other enhancement initiatives will be stymied for lack of financing.

To improve the financial viability of FCC licensees, the Commission should permit FCC licensees to grant creditors security interests in their licenses.

2. Neither The Commission's Ability To Rule On Licensee Qualifications Nor Licensee Independence Would Be Affected If Licensees Were Permitted To Grant Security Interests In Their Licenses.

The FCC has a statutory and public policy interest in ruling on the qualifications of its licensees and in ensuring that the licensees control the stations. These interests would not be jeopardized if the Commission adopted the position advocated in the Petition for Declaratory Ruling of Hogan & Hartson (dated Feb. 21, 1991) ("Petition").

The Petition asks the Commission to declare that security interests in FCC licenses are permissible (a) if such interests "leave control of the license with the

licensee" (even following a default) "unless and until the FCC has approved an assignment of the licensee to a new party," and (b) provided that, in the event of foreclosure, "the licensee be put up for public or private sale together with the . . . assets" in which the security interests are held. (Petition at 27.) Under this proposal, a secured creditor would not be able to transfer the broadcast license through a foreclosure sale without Commission approval. Nor would a creditor be able itself to assume control of a license without Commission approval. Thus, the existence of a security interest would not affect the Commission's ability to fulfill its responsibility to give advance approval to any transfer of control of a broadcast license.

Other government agencies allow creditors to take security interests in government licenses. Several examples are cited in the Petition. In addition to those examples, the Forest Service system allows creditors to have a security interest in special-use permits. Those permits, which are like licenses, allow private parties to use government lands under the jurisdiction of the Forest Service for purposes such as ski resorts. The Forest Service rules allow a permittee to assign its special-use permit to a private lending institution provided that the permittee is liable under the permit (equivalent to FCC control) and cannot sell the permit without Forest Service

approval (equivalent to FCC approval for the assignment or transfer of a license). Forest Service Manual, Section 2717.3 (June 1, 1990). Permitting licensees to grant a security interest in an FCC license would not threaten the Commission's ability to rule on the qualifications of licensees nor would it threaten licensees' control of the stations just as the Forest Service system does not affect the Forest Service's ability to rule on the qualifications of permittees or threaten permittees' control of the special-use permits.

3. The Commission Should Consider Promulgating
A Clear Change In Policy And Statutory
Interpretation Through A Well-Reasoned Decision.

According to the Petition, the Commission has on various occasions stated or suggested that a creditor cannot hold a security interest in an FCC license. (Petition at 2.) The Petition urges that these statements and suggestions are only "loose dicta," and that as such, they pose no impediment to the Commission's issuance of a declaratory ruling that a creditor may hold a security interest in an FCC license. (Id.)

Regardless of the validity of this argument, it should be noted that an administrative agency is not powerless to change its interpretations of its governing statutes. For example, only a few months ago, the United

States Court of Appeals for the District of Columbia Circuit held that "[a]n agency, of course, may change its interpretation of a governing statute." Central States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099, 1110 (D.C. Cir. 1991) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983)). Such a statutory interpretation change may be made if the new interpretation is a "permissible reading" of the governing statute and if the agency states "cogent reasons" for making the change. Id. See also Wheeler v. Heckler, 787 F.2d 101, 105 n.5 (3d Cir. 1986); Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 510-11 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

These precedents would allow the Commission to change any prior interpretations it may have rendered indicating that the Communications Act bars security interests in FCC licenses. Thus, in our view, if the Commission concludes that it should allow creditors to take security interests in FCC licenses, the Commission should consider treating that decision as a change in agency policy and statutory interpretation. Further, it should support its decision with the requisite showing that its new interpretation constitutes a "permissible reading" of the Communications Act and has been made for "cogent reasons." Central States Motor Freight, 924 F.2d at 1110. By proceeding in this fashion, the Commission would stand on

firmer ground than if it merely sought to explain away or reinterpret its previous pronouncements in this area.

Changes in FCC policy have been sustained by the courts when accompanied by a reasoned decision. For instance, in United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989), the court upheld the Commission's decision to reinstate the syndicated exclusivity rules. The court found that "the Commission's report, which examines in great detail its 1980 decision to eliminate syndex, meets this circuit's standard that an agency changing course must 'supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.'" Id. at 1181 (citing Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987)). The court found that the Commission's report "review[ed] in detail the history of the regulation of cable, including, in particular, the 1980 decision to eliminate syndex rules," "note[ed] several ways in which the Commission now feels the 1980 decision to have been inadequate," "examine[d] the negative aspects of syndex rules," and "in toto suggest[ed] that [the Commission] undertook a thoroughgoing review of the syndex question and

came to a new result with full awareness of its prior choices." Id. at 1181-82 (citations omitted).¹

Certainly, the interpretation of the Communications Act of 1934, as amended, sought by the Petition (i.e., that under limited circumstances, security interests may be taken in FCC licenses) constitutes a "permissible reading" of the Act. Central States Motor Freight, 924 F.2d at 1110. Indeed, the Act does not even

¹ The Commission need not necessarily find a change in circumstances to alter any purported past policy on allowing a creditor to take a security interest in a license, so long as it provides a well-reasoned decision. In Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), the court upheld the Commission's decision to deny the renewal application of a broadcast licensee. At the heart of the matter were allegations that an individual associated with the licensee had improperly tried to influence the chairman of the Commission. Id. at 844-5. The Commission had allowed the station to operate for nearly twelve years, mostly with temporary authorizations. Id. at 849. Then, in the context of a license renewal proceeding, the Commission voided the original license. Id. at 857. The court upheld the Commission's reversal, noting that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." Id. at 852. The court also observed that

an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably tense to the intolerably mute.

Id. at 852. The court found that the Commission had diligently taken a "hard look" at the problem areas and "set forth with clarity grounds of reasoned decision." Id. at 853.

refer to security interests in FCC licenses, let alone explicitly bar them. And the foregoing discussion and the rationales offered in the Petition provide "cogent reasons" for declaring the interpretation sought by the Petition, regardless of whether such a declaration would depart from prior precedent. Id. The Commission should consider granting the Petition on this alternate basis.

Conclusion

For all of the foregoing reasons, the Petition should be granted.

Respectfully submitted,



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April 22, 1991

CERTIFICATE OF SERVICE

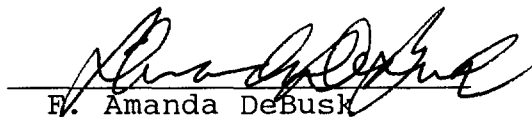
I hereby certify that a copy of the attached document was served by hand delivery on this 22nd day of April, 1991, on the following:

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